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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

TAMARA MOORE, GRETA L. ERVIN,
 RAFF ARANDO, NICHOLS SMITH,
 RENEE EDGREN, and CYNTHIA
 WELTON on behalf of themselves and
 all others similarly situated,

Plaintiffs,

v.

MARS PETCARE US, INC.; ROYAL
 CANIN U.S.A., INC.; and HILL'S PET
 NUTRITION, INC.,

Defendants.

Case No. 3:16-cv-7001-MMC

[PROPOSED] ORDER DENYING DEFENDANT MARS PETCARE US, INC.'S MOTION FOR SUMMARY JUDGMENT

Judge: Hon. Maxine M. Chesney
 Date: 03/24/2023
 Time: 9:00 a.m.
 Crtrm.: 7

Action Filed: 12/07/16
Trial Date: unassigned

On December 19, 2022, Defendant Mars Petcare US, Inc. ("Mars") filed a
 Motion for Summary Judgment on Plaintiff Renee Edgren's individual claims, and
 Plaintiff Edgren responded in opposition to the motion. The motion was heard on

1 March 24, 2023. The Court, having considered the papers and materials submitted in
 2 support of and in opposition to the motion, oral arguments made at the hearing, and
 3 the applicable law, rules as follows:

4 Ms. Edgren sued Defendant Mars alleging that Mars engages in deceptive and
 5 misleading conduct in violation of California’s Unfair Competition Law, False
 6 Advertising Law, and Consumer Legal Remedies Act. Specifically, Ms. Edgren
 7 contends that Mars’ use of a false and misleading prescription requirement for its
 8 Iams Veterinary Formula (“IVF”) pet food products, and its material
 9 misrepresentations and omissions about these products, deceived Ms. Edgren and
 10 other reasonable consumers into believing that these products are prescription
 11 products and contain a drug or medicine necessary for their sick pets. Ms. Edgren
 12 contends that by imposing and enforcing the prescription requirement, Mars made
 13 two false representations to consumers, including Ms. Edgren: (1) that Iams
 14 Veterinary Formula products contain a drug or medicine, and (2) that a prescription
 15 is required to purchase Iams Veterinary Formula products and thus, these are
 16 prescription products. She also claims that Mars makes material omissions about its
 17 Iams Veterinary Formula products by failing to disclose to consumers on the product
 18 labels or elsewhere that IVF products are not legally required to be sold by
 19 prescription and that they do not contain a drug or medicine.

20 Mars contends that Ms. Edgren has failed to put forth sufficient evidence to
 21 show a genuine dispute as to any material fact and that it is entitled to judgment as
 22 a matter of law as to her individual claims. Fed. R. Civ. P. 56(a). Specifically, Mars
 23 argues that Ms. Edgren’s deposition testimony fails to show that she actually relied
 24 upon the alleged deceptive or misleading statements by Mars. Plaintiff Edgren
 25 responds, however, that Mars misconstrues this case as a pure labeling and/or
 26 advertising case and that she has put forth sufficient evidence that she relied on
 27 Mars’ self-imposed prescription requirement as a substantial factor in deciding to
 28 purchase the IVF product for her dog Barkley because the “prescription” Mars

1 required for its IVF products misled her into believing that IVF products contain
2 medicine or drugs that were necessary for Barkley's health.

3 Defendant Mars sells various lines of pet foods, including its "Iams Veterinary
4 Formula" line (until it was discontinued on Jan. 1, 2017). For all IVF products, Mar
5 restricted the sale of those products to only those customers whose veterinarians
6 "prescribed" an IVF product. In other words, consumers could not buy IVF products
7 without a prescription from a veterinarian; a veterinary prescription was a
8 mandatory prerequisite to purchase any IVF product. (*See* Davis Decl. Ex. A at
9 97:15–98:3). Plaintiffs refer to this requirement as the prescription requirement. The
10 prescription requirement was communicated clearly to consumers on the labels of
11 IVF products, which stated, "dog food prescribed and sold only by veterinarians" and
12 "authorized by prescription and sold only through veterinarians." (Davis Decl. Ex. B).
13 Mars contractually required all veterinary, in-store, and online retailers of IVF
14 products to sell those products only to consumers who have a prescription or
15 prescription authorization from their vet. Mars' internal communications further
16 confirm that Mars imposed the prescription requirement and required consumers to
17 purchase the IVF products only pursuant to a prescription from their veterinarian.
18 (Davis Decl. Ex. C; Ex. D).

19 By imposing and enforcing the prescription requirement on all retailers of its
20 IVF products, Mars represented and communicated to every retailer, and to every
21 consumer who purchased an IVF product -- including Plaintiff Ms. Edgren -- that a
22 prescription from a vet was required to purchase the IVF products and that such
23 products are prescription products.

24 Mars implemented and enforced the prescription requirement despite the fact
25 that (a) there was (and is) no legal requirement that Mars limit the sale of its
26 products to customers who have received a prescription from their vet, and (b) IVF
27 products contain no drug or medicine. (Davis Decl. Ex. A at 66:19–67:4). Because
28 consumers could not purchase IVF products without a prescription, every purchaser

1 of IVF products necessarily was exposed to Mars' prescription requirement and false
 2 representation that a prescription was required to buy these products, and that, as a
 3 "prescription" product, IVF products contained medicine or drugs necessary for the
 4 health of their pets.

5 In December 2014, Ms. Edgren purchased an Iams Veterinary Formula
 6 product called "Veterinary Skin & Coat Plus Response KO" dog food that her vet
 7 prescribed for Barkley. (Davis Decl. Ex. E at 36:20–25). Ms. Edgren repeatedly
 8 testified that she was exposed to, relied upon, and was misled by Mars' false
 9 prescription requirement when she purchased this IVF product. (*Id.* at 56:20–57:7,
 10 115:17–115:25). Ms. Edgren confirmed that she purchased the IVF product because
 11 her vet *prescribed* it and that the prescription itself influenced her purchase
 12 decision.¹ (*Id.* at 63:12–21, 102:25–103:7, 131:24–132:1).

13 Further supporting her claims that she relied on the prescription requirement
 14 in purchasing the IVF product for Barkley, Ms. Edgren testified that that the fact
 15 that IVF products were prescription dog food led her to believe the products had a
 16 drug or medicine in them. (Davis Decl. Ex. E at 20:7–12, 67:21–68:1, 113:22–114:7,
 17 117:13–18). Plaintiffs further proffered expert evidence that a significant percentage
 18 of potential purchasers of prescription pet food products believe that those products
 19 contain and drug or medicine based on the way that they are labeled and sold (*i.e.*,
 20 pursuant to a prescription). (Report of Rebbecca Reed-Arthurs at ¶¶ 23, 126–143).
 21 Mars admits that none of its Iams Veterinary Formula products contained a drug or
 22 medicine. Thus, Plaintiff Edgren has put forth sufficient evidence to create an issue
 23 of material fact as to whether Mars' prescription requirement constitutes a material
 24

25 ¹ ¹ As the Ninth Circuit explained, the prescription requirement is material because
 26 "it is reasonable for a consumer to rely on the prescription requirement . . . in her
 27 purchasing decision for an ailing pet. Pets can, after all, be as cherished and cared for
 28 as family members, and a reasonable person in Plaintiffs' shoes would rationally
 gravitate toward a "prescription" product if that family member's health is at risk."
Moore v. Mars Petcare US, Inc., 966 F.3d 1007, 1021 (9th Cir. 2020).

1 misrepresentation on which she relied.

2 Under California law, a class representative proceeding on a claim of
3 misrepresentation must demonstrate actual reliance on the allegedly deceptive or
4 misleading statements. See *In re Tobacco II Cases*, 46 Cal. 4th 298, 306, 207 P.3d 20,
5 26 (2009). The Ninth Circuit’s ruling in this case established that the “test for
6 reliance in cases premised on false advertising and misrepresentation to consumers
7 derives from the California Supreme Court decision in *In re Tobacco II*[.]”. See *Moore*
8 *v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1020 (9th Cir. 2020). To demonstrate a lack
9 of reliance, the defendant must show that the plaintiff admitted that she did not rely
10 on the misrepresentations or omissions of the defendant. *E.g.*, *Hawkins v. Kroger Co.*,
11 512 F. Supp. 3d 1079, 1093 (S.D. Cal. 2021). In other words, unless it is absolutely
12 clear from the plaintiff’s testimony that the plaintiff did not rely on the
13 misrepresentation or omissions at issue, a court should deny summary judgment on
14 the issue of reliance and let the jury decide the issue. See *id.*

15 Plaintiff’s testimony and evidence is sufficient to demonstrate a genuine issue
16 of material fact as to whether Ms. Edgren’s relied on the prescription requirement in
17 deciding whether to purchase the Iams Veterinary Formula product. Mars’ attempts
18 to limit the type of misrepresentation or omission to only those appearing in an
19 advertisement or in traditional consumer-facing marketing from Mars itself are
20 unavailing. Plaintiff’s proffered evidence is sufficient for a finder of fact to conclude
21 that through the prescription requirement, Mars’ makes material misrepresentations
22 to consumers, including Ms. Edgren, that its IVF products contain a drug or medicine
23 and are prescription products, that Plaintiff’s veterinarian was required to prescribe
24 the IVF product in order for Plaintiff to buy it, and that the prescription was a
25 substantial factor in Plaintiff’s decision to purchase Mars’ IVF product for Barkley.

26 Mars also seeks summary judgment on Ms. Edgren’s claims for injunctive
27 relief, arguing that because Mars has discontinued the IVF line of products and
28 because Ms. Edgren testified that she would not purchase prescription pet food in the

1 future “if there is no drug in it[,]” she does not face the type of “actual and imminent”
 2 “threat of injury” required to satisfy standing to pursue such relief. *See Davidson v.*
 3 *Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). This argument is likewise
 4 unavailing. *Davidson* established that a plaintiff may retain standing to pursue
 5 injunctive relief if she establishes that she “will be unable to rely on the product's
 6 advertising or labeling in the future, and so will not purchase the product although
 7 she would like to.” *Id.* at 969. First, Mars has not guaranteed that it will never sell
 8 the IVF product line or another similar false prescription product again.
 9 Additionally, if Mars does not intend to sell IVF products or other similar products
 10 using the false prescription requirement in the future, then the balancing of
 11 hardships promotes the court awarding Ms. Edgren the injunctive relief sought as
 12 Mars will not be harmed by the injunction. *E.g., Vital Pharms. v. PhD Mktg., Inc.*,
 13 No. CV 20-06745-RSWL-JCX, 2022 WL 2952495, at *8 (C.D. Cal. July 26, 2022).
 14 Finally, per *Davidson*, Ms. Edgren has standing to pursue injunctive relief because
 15 she would be willing to purchase prescription pet food in the future if she could
 16 ensure the truthfulness of the prescription requirement. Unless Mars is enjoined
 17 from its deceptive prescription requirement, Ms. Edgren cannot be sure that it has
 18 ceased its misrepresentations and could suffer further injury in the future. *See*
 19 *Johnson-Jack v. Health-Ade LLC*, 587 F. Supp. 3d 957, 976 (N.D. Cal. 2022) (finding
 20 plaintiff had standing to pursue injunctive relief due desire to purchase deceptively
 21 marketed product only if the court enjoins the deceptive practices so plaintiff can
 22 trust it is what it claims to be). Ms. Edgren’s testimony supports that she has
 23 suffered an injury-in-fact and demonstrates a genuine issue of material fact as to an
 24 actual and imminent threat of injury absent an injunction against Mars’s challenged
 25 conduct. She thus has standing to seek injunctive relief.

26 Lastly, Mars’ contention that because Ms. Edgren moved out of California she
 27 is no longer able to avail herself of the protections of the California consumer
 28 protection statutes is incorrect. Ms. Edgren’s claims arise from purchases made in

1 California, based on Mars' misrepresentations made to her in California, and she
2 suffered injuries in California. The case law is clear that "non-California citizens
3 who made purchases in California could assert the same California causes of action
4 that [California citizen] Plaintiffs do[.]" *Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp.
5 2d 1134, 1148 (N.D. Cal. 2013). The fact that Ms. Edgren has moved from California
6 has no impact on her claims in this case.

7 **CONCLUSION**

8 Accordingly, for the foregoing reasons, Mars' Motion for Summary Judgment is
9 **DENIED.**

10
11 **IT IS SO ORDERED.**

12
13 DATED:

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The Honorable Maxine M. Chesney
United States District Judge

PROOF OF SERVICE

**Moore, et al. v. Mars, et al.
Case No. C:16-cv-7001-MMC**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the county where the mailing took place, My business address is 650 California Street, 26th Floor, City and County of San Francisco, CA 94108-2615.

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**[PROPOSED] ORDER DENYING DEFENDANT MARS PETCARE US, INC.'S MOTION
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BY ELECTRONIC TRANSMISSION: Pursuant to CCP 1010.6(e), I caused the above-titled document(s) to be electronically served on the persons at the electronic service addresses listed.

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Executed on March 23, 2023, at San Francisco, California.



Kirsten Benzien

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